United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7695

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P/S

To be argued by
LAWRENCE WEINSTOCK

In The

United States Court of Appeals

For The Second Circuit

DAWN DONOHUE, an infant by DOROTHEA DONOHUE, her Mother and Natural Guardian, and DOROTHEA DONOHUE, individually,

Plaintiffs-Appellants,

- against -

ALBERT RAPELLA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF SUBMITTED ON BEHALF OF DEFENDANT-APPELLEE

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STATEMENT OF FACTS

This case involves a claim for personal injuries allegedly sustained by the infant plaintiff DAWN DONOHUE, and a claim for loss of services and medical expenses and emotional injuries allegedly sustained by DOROTHEA DONOHUE. (3a, Record on Appeal) The action was instituted by the service of a Summons and Complaint on the defendant, ALBERT RAPELLA, on March 6, 1975. (1a)

After the institution of this action, the deposition of the plaintiffs were taken. During the course of those depositions, DOROTHEA DONOHUE, testified that at that time, she resided at 200 Third Avenue, Belmar, New Jersey (53a) and that her children who still live with her attended school in Belmar, New Jersey (54a). Mrs. Donohue testified that her children transferred to schools in New Jersey in November 1973 (61a). She further testified that from November 1973 to November 1974, the family resided at 132 Cookman Avenue, Oceangrove, New Jersey. (59a, 60a) Thereafter the family moved to 151 Stockton Avenue, Oceangrove, New Jersey where they remained for eight months. (56a, 57a) From September 1974 to June 1975, the family resided at 327 16th Avenue, Belmar, New Jersey (56a)

At the time of her deposition, Mrs. Donohue testified

that neither she nor her husband had voted in a couple of years (62a). She testified that neither she nor her husband were registered to vote (62a) and later when the transcript of the deposition was executed, she amended her answer to state that she and her husband last voted in 1972 (123a) and this was in the State of New York. She also amended her testimony to state that in 1973 she and her husband were registered to vote, since they had registered in prior years (123a). Mrs. Donohue was asked whether she or her husband filed state income tax returns and whether they filed as residents or non-residents. She indicated that she had no information as to whether these returns were filed. A space was left in the transcript to answer these questions, but she failed to answer them when the transcript was executed (63a, 64a, 123a). Likewise, she was questioned as to whether a New York City income tax return was filed for the year 1973. She testified that she would answer this question upon execution of the transcript, but she failed to answer this question when the transcript was executed (65a, 123a).

In the course of her deposition, Mrs. Donohue testified that neither she nor her husband have been employed since November 1973 (63a). She further testified that neither she nor her husband owned any property in the State of New York (65a). At the deposition, Mrs. Donohue testified that she had

no place picked out to live in New York (110a) and had not gone to any real estate agents to locate an apartment (110a). She testified that the only thing she did in regard to locating a place to live in New York was to inquire from a friend of hers (110a). When the deposition was corrected after presumably being read by Mrs. Donohue, these answers were not changed although other corrections in other areas of the transcript were made (123a, 124a). No changes of this testimony was made until after the motion to dismiss had been made and the above testimony was pointed out as showing the plaintiffs had no intention of returning to New York (49a, 50a).

Concerning the medical treatment rendered to DAWN DONOHUE, Mrs. Donohue testified that following Dawn's discharge from the hospital, Dr. Jasaitis was first seen one week after discharge (87a), and that all he did at this visit was to cut the cast down. The second visit to Dr. Jasaitis was approximately three weeks later and all Dr. Jasaitis did at this time was to remove the cast and to prescribe baths and exercises to be done at home. (87a, 88a). The next visit to Dr. Jasaitis was six weeks later and that this was just a check-up (88a, 89a). Two months later, Dr. Jasaitis was seen again and this was just for a check-up. (89a) Two and one-half months later, the Doctor was seen again and this was for another check-up. (90a) The infant was next examined in approximately August 1975. (90a) The infant never received

any physiotherapy treatments (90a). Thus, Mrs. Donohue testified that the infant was seen by Dr. Jasaitis on approximately six occasions over a period of two years.

The only document emanating from Dr. Jasaitis in the entire Record on Appeal is a bill which has as its last entry for any treatment, August 28, 1973 (213a). If any subsequent bills were rendered by Dr. Jasaitis, they were not included in the Record on Appeal. There is nothing in the Record on Appeal from any doctor or hospital showing that furtner medical treatment is required or even contemplated. There is nothing in the Record on Appeal from any doctor or hospital to show the necessity for any frequent medical treatment. There is nothing in the Record on Appeal to show that the plaintiffs have remained in New Jersey for the purpose of being near the doctor. In fact, both Mrs. Donohue's testimony and the bill from Dr. Jasaitis show that the bulk of all treatment was rendered while the plaintiffs were still living in New York. After November 1973, the Record on Appeal demonstrates that the only medical treatments rendered were infrequent visits for check-ups.

The only statement by a physician concerning the infant-plaintiff's condition is contained in the hospital record (231a). Rather than showing the need for any future medical treatment, the hospital record shows that the prognosis for DAWN DONOHUE was favorable. In the final summary

from the hospital record, Dr. Jasaitis noted that the infant was discharged from the hospital three days after the accident (232a). Dr. Jasaitis noted that the infant's condition on discharge was improved and the prognosis was good. Dr. Jasaitis indicated that a probable period of disability was three months (232a). There is no written report by Dr. Jasaitis in the Record on Appeal to indicate any change in this thinking.

Mrs. Donohue first mentioned the possibility of future surgery in her March 1975 letter which was coincidently postmarked one day before the defendant was served (244a). The possibility of future surgery was again mentioned in Mrs. Donchue's affidavit (204a) which was sworn to November 18, 1975 (210a). In this period of seven and one-half months, no further report was obtained from Dr. Jasaitis to show any change in his thinking as expressed in the discharge summary in which a good prognosis is indicated.

Mrs. Donohue has indicated that she has been offered apartments by two of her relatives (205a). One of these apartments is apparently within easy commuting distance of the doctor's office, (211a, 212a), however Mrs. Donohue has not accepted either of these apartments. Nowhere in the Record on Appeal is there any indication of where Mr. Donohue presently resides or where he resided at the time suit was instituted.

POINT I

DOMICILE OF THE PARTIES ON THE DATE SUIT IS INSTITUTED IS DETERMINATIVE OF DIVERSITY OF CITIZENSHIP

It has consistently been held that in diversity of citizenship actions that the issue of citizenship of the parties must be determined as of the time that the suit is instituted. Gilbert v. David, 235 U.S. 561 (1915); Brough v. Strathman Supply Co. Inc., 358 F. 2d 374 (3d Cir. 1966); Mas v. Perry, 489 F. 2d 1396 (5th Cir. 1974); Peterson v. Allcity Ins. Co., 472 F. 2d 71 (2d Cir. 1972).

In Gilbert v. David, supra, the Supreme Court stated:

> "If the plaintiff was domiciled in the State of Michigan when the suit was begun, he was a citizen of that state within the meaning of the judicial code." 235 U.S. at p. 569.

In Russell v. New Amsterdam Casualty Company, 325 F. 2d 996, 998 (8th Cir. 1964), the Court stated:

> "(1) Statutes conferring federal jurisdiction are to be strictly construed; (2) if the jurisdictional allegations are challenged by the defendant, the plaintiff has the burden of establishing jurisdiction by competent proof and by a preponderance of the evidence; (3) citizenship and domicile are synonymous for purposes of 28 USCA §1332; (4) diversity of citizenship must exist not as of the time the cause of action arises, but as of the time the suit is instituted;

> (5) any person sui juris, may make a bona fide change of citizenship at any time; (6) when an action is brought by a legal representative, such as an administrator of the estate of a deceased person, it is the representative's personal citizenship which is pertinent in determining the existence of diversity."

The Court stated in Mas v. Perry, supra, that:

> "As is the case in other areas of federal jurisdiction, the diverse citizenship among adverse parties must be present at the time the complaint is filed." 489 F. 2d at p. 1399.

Numerous other cases have held the same proposition. Webb v. Nolan, 484 F. 2d 1049 (4th Cir. 1973); Julien v. Sarkes Tarzian Inc., 352 F. 2d 845 (7th Cir. 1965); Janzen v. Goos, 302 F. 2d 421 (8th Cir. 1962); Corabi v. Auto Racing Inc., 264 F. 2d 784 (3d Cir. 1959); Early v. Hershey Transit Co., 55 F. Supp. 981 (MDPA 1944).

In the instant action, ALBERT RAPELLA was served on March 6, 1975 (1a) and diversity of citizenship must be determined as of that day.

POINT II

THE PLAINTIFFS WERE CITIZENS OF THE STATE OF NEW JERSEY WHEN THIS ACTION WAS INSTITUTED

The Federal Courts have frequently held that in questions involving diversity of citizenship, it is not the stated intent of any party which is completely controlling, but rather, it is a total view of the activities and contacts within a state that must be judged in any determination of diversity. Webb v. Nolan, 484 F. 2d 1049 (4th Cir. 1973); Hendry v. Masonite Corp., 455 F. 2d, 955 (10th Cir. 1972); Korn v. Korn, 398 F. 2d 689 (3d Cir. 1968).

In the Webb case, supra, the plaintiff pleaded that she was a resident of the State of California. She instituted suit in North Carolina. The facts showed she was registered to vote in the State of California and the plaintiff testified that she intended to return to California. However, the plaintiff had re-acquired her former home in North Carolina and was residing there at the time the action was instituted. She was not employed in California on the date the action was commenced and she met the requirements of domicile to register to vote in North Carolina. The Court held that under these circumstances, the plaintiff was clearly a citizen of

North Carolina and not of California and thus, diversity jurisdiction did not exist.

In the Korn case, supra, the Court stated:

> "One's testimony as to his intention to establish a domicile, while entitled to full and fair consideration, is subject to the infirmity of any self-serving declaration, and it cannot prevail to establish domicile where it is contradicted or negated by an inconsistent course of conduct; otherwise stated, actions speak louder than words."

Likewise in the case of Campbell v. Oliva, 295 F. Supp. 616 (E.D. Tenn. 1968), the Court stated:

> "One's testimony with regard to his intention is, of course, to be given full and fair consideration, but it is subject to the infirmaty of any self-serving declaration, and may frequently lack persuasiveness or be contradicted or negated by other declarations and inconsistent acts." at p. 618.

The Supreme Court, in the case of Texas v. Florida, 306 U.S. 398 (1939), has indicated the following tests of domicile:

> "Residence in fact, coupled with the purpose to make the place of residence one's home are the essential elements of domicile." 306 U.S. at p. 424.

Continuing, the Court stated:

> "While one's statement may supply evidence of the intention, requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there ....(Citations omitted) and they are of sleight weight when they conflict with the fact." 306 U.S. at p. 425.

In the Hendry case, supra, the Court again clearly showed that statements of intent are not controlling:

> "For purposes of federal diversity jurisdiction'citizenship' and 'domicile' are synonymous. In determining one's citizenship or domicile statements of intent are entitled to little weight when in conflict with the facts. Welsh v. Am Surity Co., 186 F. 2d 16 (5th Cir. 1951)". 455 F. 2d 955.

The Supreme Court, in District of Columbia v. Murphy, 314 U.S. 441 (1941) has indicated the following:

> "The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary." 314 U.S. at p. 455. "One's testimony with regard to his intention is of course to be given full and fair consideration, but is subject to the infirmaty of any self-serving declaration, and may frequently lack persuasiveness or even be contradicted or negatived by other declarations and inconsistent acts." 314 U.S. at p. 456.

Courts have held a person to be a citizen of one state

in spite of that person's statements that he did not consider himself to be a citizen of that state or was in fact a citizen of another state. Russel v. New Amsterdam Casualty Company, 325 F. 2d 996 (8th Cir. 1964).

In determining a party's state of mind and that party's intention, then words are often not the best proof. Rather, a person's intentions must often be judged by his actions. Griffen v. Mathews, 310 F. Supp. 341, aff'd 423 F. 2d 272 (4th Cir. 1972). In the case of Stine v. Moore, 213 F. 2d 446 (5th Cir. 1955), the Court stated:

> "Mere mental fixation of citizenship is not sufficient. What is in another man's mind must be determined by what he does as well as what he says."
> "Words may be evidence of a man's intention to establish his domicile at a particular place of residence but they cannot supply the fact of his domicile there. In such circumstances, the actual fact of residence and a real intention of remaining there, as determined by his entire course of conduct are the controlling facts of his domicile." 213 F. 2d at p. 448.

Federal Courts have held that in cases involving a married man, his domicile is presumed to be where his wife and family reside. In the case of Mezzick v. Southern Pennsylvania Bus. Co., 59 F. Supp. 799 (E.D. Pa. 1945), the Court stated:

> "The law presumes that a married man's domicile is where his wife and family reside if that is a permanent home and there is no proof of separation." 59 F. Supp. at p. 800.

A similar statement was made by the Court in Broad-Stone Realty Corp. v. Evans, 213 F. Supp. 261, 265 (S.D. N.Y. 1962).

A vague intention to leave a present residence at some unspecified future date will not operate to destroy domicile in that present domicile. In the Gilbert case, supra, the Supreme Court stated:

> "It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut should he succeed in disposing of it for what he considered it worth. But as we have seen, a floating intention of that kind was not enough to prevent the new place, under the circumstances shown from becomming his domicile. It was his place of abode which he had no present intention of changing, that is the essence of domicile." 235 U.S. at p. 570.

Similarly, in the case of Gallagher v. Philadelphia Transportation Co., 185 F. 2d 543 (3d Cir. 1950), the Court expressed itself as follows:

> "It is not important if there is within contemplation a vague possibility of eventually returning whence one came (Citations omitted). If the new home is to be one's home for an indefinite period of time, he has acquired a new domicile." 185 F. 2d at p. 546.

To acquire a new domicile of choice, presence and the intention to make that place the present home is required. The intention to live there permanently is not required. If the new state is to be one's home for an indefinite period of time he has acquired a new domicile. Krasnov v. Dinan, 465 F. 2d 1298 (3d Cir. 1972); Rogers v. Bates, 431 F. 2d 16 (8th Cir. 1970). Likewise, it has been held that the motive for a change of domicile is irrelevant. Williamson v. Osenton, 232 U.S. 619 (1914).

In the instant case, all the relevant proof educed shows clearly that all contacts with the State of New York ended in November 1973. Although the Donohue family resided in New York until November 1973, all members of the family still living at home moved to New Jersey at that time (59a, 60a). At that time, the children who were still living at home transferred to schools in the State of New Jersey (54a). At that time, Mr. Donohue retired and neither he nor Mrs. Donohue have worked since November 1973 (63a). Mr. and Mrs. Donohue last voted in the State of New York in 1972 (123a).

Although it was indicated that the plaintiff has information as to any New York State or New York City income tax returns which might have been prepared, the plaintiff-appellant failed to supply this information (63a, 64a, 123a). The plaintiff-appellant testified that she had no place picked out to live in New York and had not gone to any real estate agent to locate an apartment (110a).

The only connections with the State of New York after November 1973 are the plaintiff-appellant's self-serving declarations. A letter postmarked March 5, 1975 is pointed to as objective proof of the intent to remain a New York citizen, made at a time when there was no motive for such a statement. The coincidence in timing this letter one day prior to the service of a Summons and Complaint which is replete with allegations attempting to show New Jersey as a "temporary" residence destroys any objective value which this self-serving statement might have.

The stated reason for the t mporary residence in New Jersey is to be near the infant-plaintiff's treating physician. Both the testimony of the plaintiff-appellant and the bill submitted by the doctor show that there were not in fact numerous visits to the doctor after November 1973. To the contrary, the proof shows very few visits to the doctor after November 1973. The plaintiff-appellant has alleged that there is to be future surgery for the infant-plaintiff.

Absolutely no proof of this by any physician has been submitted. In fact, the only proof submitted by any medical authority shows a favorable prognosis. Thus, the only proof of New York citizenship offered by the plaintiff-appellant other than her self-serving statements, disproves the basis for those statements. Further, at no time has the plaintiff-appellant come forward with any proof of the present residence of her husband. The objective proof submitted by the plaintiff-appellant clearly demonstrates that the plaintiff-appellant abandoned the only residence she had in the State of New York in November 1973, long before this action was instituted.

POINT III

THE DECISION OF THE LOWER COURT SHOULD NOT BE DISTURBED UNLESS THERE WAS NO BASIS FOR THE DECISION

The determination of an issue of diversity of citizenship is for the most part a question of fact. Julien v. Sarkes Tarzian Inc., 325 F. 2d 845, 487-88 (7th Cir. 1965). The determination of the Court that initially decided this issue should not be set aside unless it is clearly erroneous. D. H. Walden v. Broce Construction Corp., 357 F. 2d 242 (10th Cir. 1966); Appelt v. Whitty, 286 F. 2d 135 (7th Cir. 1961). The Court in the Walden case stated:

> "We have heretofore held in Mid-Continent Pipe Line Company v. Whitley, 10 Cir. 116 F. 2d 871, that an allegation of diversity of citizenship when challenged, is not enough; that where the evidence and the inferences and deductions fairly to be drawn from it present a conflict upon that question of fact, it is for the trial court, who heard and observed the witnesses, to decide what inferences and deductions are to be drawn.... In Hill v. Gregory, 241 F. 2d 612 (7 Cir.), holding that under Rule 52(a) of the Federal Rules of Civil Procedure, it is for the trial judge to determine the propriety of the inferences and conclusions to be drawn from the undisputed facts,

> the court said, quoting from its prior decision in Central Ry. Signal Co. v. Longden, 7 Cir., 194 F. 2d 310, 'His is the primary function of finding the facts and choosing from amongst conflicting factual inferences those which he considers most reasonable. Even where there is no dispute about the facts, if different reasonable inferences may be fairly drawn from the evidence, we are forbidden to disturb the findings based on such inferences unless they are clearly erroneous'". 357 F. 2d at p. 244-45.

In Krasnov v. Dinan, 456 F. 2d 1298 (3d Cir. 1972), the Court stated:

> "It is the responsibility of an Appellate Court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the facts found by the trial court. To hold otherwise, would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial system, either by American common law tradition or by rule and statute." 465 F. 2d at p. 1302-03.

Clearly the Court in the instant action had a sufficient basis for its decision. The evidence introduced

by the plaintiffs-appellants clearly demonstrates that New Jersey was their domicile at the time this action was instituted. There is no factual basis whatsoever for a finding that New York was the domicile. As is clearly seen from the Order appealed from, the plaintiffs-appellants are not left without a remedy. They may proceed in the Courts of the State of New Jersey (248a).

CONCLUSION

Wherefore, it is respectfully submitted that the decision and order of Judge Pollack be affirmed in all respects.

Respectfully submitted,

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U.S. COURT OF APPEALS:2nd CIRCUIT

DAWN DONOHUE, etal

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- against -

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Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

That on the 15th *day of* March *19*76 *at* 11 Park Place, New York, New York

deponent served the annexed Appellee's Brief *upon* CORCORAN AND BRADY attorneys for

the Appellant *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 15th *day of* March *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele

JAMES A. STEELE